Supreme Court, U. S.
FILED
APR 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1151

UNITED STATES OF AMERICA,
Petitioner,

vs.

RALPH CECCOLINI,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Pursuant to an order of this Court, the time for filing the within brief has been extended to April 13, 1977.

Questions Presented.

In the opinion of respondent, the following questions are presented:

1) Does the double jeopardy clause, and the decision of this Court in *U. S. v. Martin Linen Supply Co.*, 21 Cr. L. 3001 (April 4, 1977), bar the Government's attempted appeal from the judgment of acquittal entered in the District Court pursuant to Rule 29?

2) Whether the holding of the Courts below, that the Government failed to meet its burden of establishing attenuation of the taint of a concededly illegal search, was free from error and supported by substantial evidence?

Constitutional Provisions Involved.

United States Constitution Amendment 5:

> "• • • nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; • • •"

United States Constitution Amendment 4:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statutory Provisions Involved.

18 USC §3731:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Federal Criminal Rule Involved.

Federal Rule of Criminal Procedure 29.

> "Motion for Judgment of Acquittal
>
> "(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> "(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
>
> "(c) Motion after Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

Preliminary Statement.

The Government, pursuant to 18 USC 3731, appealed to the Second Circuit Court of Appeals from a judgment of acquittal entered in the Southern District of New York (Petitioner's Appendix D) on February 10, 1976, by the Hon. Lee P. Gagliardi, United States District Judge.

On that date, Judge Gagliardi announced that he acquitted the defendant on Count 2 and found him guilty on Count 1, but immediately set aside his verdict on Count 1 and granted defendant's motion for acquittal on the grounds that the evidence relied on by the Government was the unattenuated fruits of an illegal search.

Defendant contends that, under the circumstances presented by this record, a Government appeal violates the double jeopardy clause.

Defendant further contends that the courts below correctly held that the Government had failed to attenuate the taint of a concededly illegal search.

Statement of the Case.

In 1973, the Federal Government conducted a gambling investigation in the North Tarrytown area (TR 301-08). Surveillance by FBI agents had included various businesses on Beekman Avenue which were frequently visited by Joseph Millow, including defendant's flower shop. At no time during this period were the employees of *any* business enterprise located on that street questioned in regard to gambling activities. The surveillance was ultimately discontinued, in December, 1973 (TR 314).

On December 18, 1974, North Tarrytown Patrolman Ronald Biro, in uniform and on duty, entered the flower shop. A young lady named Lois Hennessey was present, observed him enter the store and continued to read her newspaper. Biro proceeded through the area open to the public into the portion of the flower shop customarily used *only* by the employees. He observed an envelope on the cash register from which allegedly protruded what appeared to be United States currency. Patrolman Biro proceeded, without further ado or probable cause, to seize

and search the envelope. He removed and examined the contents and then interrogated Miss Hennessey concerning them (TR 99-103, 185-88, 199-203). In this way he then and there discovered the existence of Miss Hennessey as a person having knowledge that could be utilized by the Government (TR 206-07). He replaced the envelope and its contents on the cash register, and left.* The defendant, who was not present at the time, was not aware that there had been a search (TR 143).

Within twenty-four hours, Patrolman Biro notified the North Tarrytown detectives (TR 203-04) who, in turn, notified FBI Agent Emory with whom they were then working jointly on a gambling investigation. Emory notified prosecutor Abzug (TR 374) and then interviewed Miss Hennessey specifically about the incident of December, 1974 (TR 363-64, 126-27; cf. 365-66). This interview occurred in or about April, 1975 (373). Thereafter, in May, 1975, defendant was subpoenaed before the grand jury, at which he appeared without counsel, and was somewhat disingenuously advised that he was not a target of the investigation (TR 373). By comparison, other witnesses in this same investigation were specifically advised of their right to counsel, of the privilege against self-incrimination, and were not given any disarming advice that they were not targets of the investigation, even when in fact they were not such targets. The 3500 material turned over by the Government showed, for example, that Miss Albanese, who appeared with counsel, was specifically warned of her privilege against self-incrimination and her right to counsel but received no statement that she was not a target of the investigation. Compare, *U. S. v. Jacobs*,

*It subsequently disappeared and there was thus no physical evidence in the possession of the Government to be suppressed. Only the testimony of Ptl. Biro (upon which Judge Gagliardi never ruled explicitly) and that of Miss Hennessey remained as the fruits of the illegal search.

547 F. 2d 772 (2d Cir. 1976). He was, however, indicted immediately thereafter when his answers were at variance with those of Miss Hennessey.

In the over six months between the illegal search and defendant's grand jury testimony, not a single other employee of this or any other business located on Beekman Avenue had been interviewed or approached by the FBI. Subsequent to his indictment, other employees of the flower shop were, in fact, subpoenaed whose testimony was consistent with that of the defendant and inconsistent with that of Lois Hennessey.*

The defendant made various motions in preparation for trial and the Court held a conference and made its rulings in July of 1975. Over two months thereafter the Government finally complied on the eve of trial. Its list of witnesses contained the name of Ptl. Biro who was

*Jane Vitagliano began working at the flower shop on February 3, 1975 (TR 407), which was long *after* the December period inquired into by the grand jury. She testified over two months after Ceccolini's testimony and after his indictment as did each other flower shop witness. Her testimony was that Millow came in just to say hello (TR 410). She had never seen any gambling of any kind at the shop (TR 412). Cathleen Kosilla, a part time employee (TR 420-25), was also summoned to the grand jury *after* Ceccolini had been indicted (TR 428). She had seen no gambling at the store (TR 429). Roseanna Pesce, who did work in the store in September and October of 1974 (TR 438) when Lois Hennessey did *not* work there (TR 438), was the wife of a New York City Police Sergeant (TR 437), had never been interviewed by the FBI, and saw absolutely no gambling (TR 439). Lois Hennessey was there only for a matter of minutes at 5 o'clock during these months (TR 438). Defendant's girl friend, Rosemary Albanese, brought to the grand jury in October *after* defendant's indictment (TR 165), saw absolutely no evidence of gambling at the flower shop (TR 172-73).

immediately interviewed by the defense. Defendant then learned for the first time of the existence of a search (TR 17-18).

The Government had contributed in no small measure to the defendant's surprise. Completely aside from failing to advise the defendant of a search of his premises when he was not present, and in the absence of a warrant or any conceivable probable cause, the Government took it upon itself to include in its discovery exhibits a certain envelope marked 12/31/74 which appeared to be, but was in fact not, the December envelope referred to in the grand jury testimony. Aside from its misleading appearance, it had absolutely no other significance on the outcome of the case.

When the defendant discovered the existence of the search, on the eve of trial, an immediate motion was made orally before Judge Gagliardi, who observed that the defendant could not have moved sooner because he had no knowledge of the search (TR 17-18). He directed that the hearing on the motion proceed simultaneously with the trial. Defendant waived trial by jury.

During the course of the trial, all of the testimony that related to the search and its fruits came from Government witnesses during the direct case: Ptl. Biro, FBI Agent Emory, Detectives Spota and DeFalco and Miss Hennessey. Judge Gagliardi determined *during the trial* that the search was illegal (Petitioner's Appendix 34A) and suppressed the results of the search. However, he also stated (Petitioner's Appendix 36A), "I don't think it makes any difference as to when I passed upon the exclusion of the fruits of the search because it was clearly inadmissible." His Honor also stated that, without the fruit of the illegal search, "there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty

of Count 1 charged in the indictment" (Petitioner's Appendix 32A). The Court added that the remaining evidence, "standing by itself, it is insufficient to prove Ceccolini guilty beyond a reasonable doubt." *Id.*

Notwithstanding that the motion to suppress was made immediately prior to the trial, and then only because the Government had withheld the existence of the search from the Court and the defendant, the Court, which heard both the motion and the trial jointly, purported to decide the merits first and the ruling on the motion to suppress only thereafter in connection with the motion for judgment of acquittal.

In effect, the combined procedure of the Government and the Court resulted in depriving the defendant of a pretrial or during the trial suppression ruling (beyond the Judge's post-verdict statement that he excluded the results of the search and that it made no difference when he passed upon the exclusion of the fruits of the search which were clearly not admissible). In the normal course of events (had the Judge suppressed prior to or during trial, or prior to announcing his verdict), since the remaining evidence was clearly insufficient and so found by the Court, the defendant would have been entitled as a matter of right to an acquittal. Instead, the Court endeavored, by the order of its rulings, to create a right of appeal in the Government. It is respectfully submitted that the procedure utilized was, in fact, a judgment of acquittal or the functional equivalent thereof and that any attempted appeal therefrom violates the double jeopardy clause.

The illegal search itself was described by both parties present (TR 66, 101-02, 184-85, 202). Patrolman Biro added that he had no prior knowledge of Hennessey as a possible witness and that he specifically learned that

at and during the illegal search conducted by him on December 18, 1974 (TR 206-07). He testified that he notified his detectives within 24 hours. They testified that they notified FBI Agent Emory. Agent Emory testified that North Tarrytown Police notified him. Miss Hennessey stated that Agent Emory told her he got the information regarding her and the December incident from the North Tarrytown Police (TR 111) and that he specifically asked her about the December incident (TR 125). She described it to him *because she knew he already had or could get that information from the North Tarrytown Police* (TR 126). On the other hand, Miss Hennessey also testified that although it was football season and football tickets were hidden in the wax paper at the store, she did not show these to Ptl. Biro (TR 139-40).

It was clear from all of the testimony summarized above that the search was:

a) without probable cause,

b) without a warrant,

c) without consent,

d) not incidental to a lawful arrest, and finally

e) conducted by a law enforcement officer on duty and in uniform, without justification and unlawfully.

It was equally clear that Miss Hennessey and her knowledge were the instant and immediate fruits of that search and the interrogation which took place as a part of that search (TR 102, 206, 111, 125-26). The District Court specifically found the search illegal and suppressed both the results of the search (Petitioner's Appendix 35A) and the fruits of the search (Petitioner's Appendix 36A).

It then set aside the verdict on the first count, as the remaining evidence was clearly insufficient to convict, exonerated bail and, pursuant to the power vested in it by F.R.Cr.P. 29 entered judgment of acquittal in favor of defendant.

POINT I.

A Government appeal would offend the double jeopardy clause.

The recent decision of this court in *U. S. v. Martin Linen Supply Co.*, 21 Cr. L. 3001 (1977), brings directly into focus what happened in the District Court in this case. Because the Government chose not to utilize the provisions of Federal Criminal Rule 12(D)(1), providing for notice to a defendant that the Government intends to introduce evidence obtained by search and seizure, the defendant in this case was totally unaware that a search of his premises had occurred in his absence (Petitioner's Appendix 6A). Egregiously, the Government delayed complying with Judge Gagliardi's pretrial order for some months so that it was not until the eve of trial that defendant's counsel first learned of Ptl. Biro or that there had been a search. The District Court expressly recognized that the defendant could not because of the Government's conduct have moved to suppress earlier (TR 17-18). The Government originally took the position that "until the trial, the Government was not concerned about a 'taint problem' because it believed Biro's search to be lawful" (Government's trial memorandum of law, p. 11). At the trial, however, the Government utterly abandoned any argument that the search was consented to, or lawful, when the testimony of its own witnesses clearly established otherwise.

It is clear that the acquittal involved "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case." *Serfass v. U. S.*, 420 U. S. at 393. This was not an order dismissing an indictment but rather an acquittal based upon the insufficiency of the admissible evidence (see opinion of Mr. Justice Stevens, concurring, *U. S. v. Martin Linen Supply Co.*). It should be noted that the acquittal was based upon the judge's determination that the residuum of legal evidence introduced at the trial "was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty • • •" and "standing by itself, it is insufficient to prove Ceccolini's guilt beyond a reasonable doubt" (Petitioner's Appendix 32A).

This is not simply a case where the post-verdict ruling is to dismiss an indictment after a guilty verdict where no new trial would necessarily result if the Government prevailed. See, e. g., *U. S. v. Wilson*, 420 U. S. 332 (1975); *U. S. v. Morrison*, 50 L. Ed. 2d 1 (1976); *U. S. v. Rose*, 50 L. Ed. 2d 5 (1976); *U. S. v. Kopp*, 50 L. Ed. 2d 336 (1976).

In *Morrison* and in *Rose* there was neither an acquittal nor even an order of dismissal. There was merely an order of suppression, which provided that appropriate action would be taken if the order was affirmed on appeal or not appealed from by the Government. In *Kopp*, the court entered a dismissal (not an acquittal) based upon an error of law relating to a matter determined at a pretrial motion and not during the trial of the general issue. In *Wilson*, the District Court *dismissed* the indictment, again reversing a ruling on a motion made *prior* to the trial and not upon a matter in issue and litigated during the trial of the general issue as was the case here. Compare *U. S. v. Lucido*, 517 F. 2d 1 (6th Cir. 1975).

In this case there was no pretrial hearing because of the Government's failure to disclose the existence of the search and the District Court's insistence that, contrary to the preferable method of proceeding in the Second Circuit (Petitioner's Appendix, p. 7A), there would be a joint hearing of the motion and the merits. Moreover, there was no good cause shown for deferring the ruling on the motion to suppress until after the verdict (which is required by rule 12[e]) as distinguished from cause for hearing the general issue and the motion together. The clear understanding of defense counsel at the time that joint hearing of the motion and trial was ordered was that the ruling on the suppression motion would precede the verdict on each count and that the findings on each count would be based on that evidence which survived the motion to suppress (Petitioner's Appendix 33A). This original understanding of counsel was nowhere disputed by the court or the Government. It certainly was a significant factor in defense counsel's reaction to the court's decision to hold a joint hearing and the defendant's decision to waive trial by jury. The action of the Government had deprived defendant of the opportunity to raise the question earlier (Petitioner's Appendix 6A). Indeed, the findings of fact which the District Court made to support its judgment of acquittal were precisely those which result from a trial of the general issue that "there was insufficient evidence to say beyond a reasonable doubt that Ceccolini was guilty" and that the admissible evidence "is insufficient to prove Ceccolini's guilt beyond a reasonable doubt" (Petitioner's Appendix 32A). Upon the unique facts of this case, the District Court's ruling, however denominated, was a judgment of acquittal based upon factual matters elicited at the trial of the general issue and the Government's attempted appeal therefrom offends against the provisions of the double jeopardy clause.

POINT II.

The courts below correctly excluded the fruits of the concededly illegal search.

In seeking to have this court review the exclusion of evidence in this case, the Government has also phrased its "Questions Presented" in its petition as to suggest that the exclusionary rule automatically prevents use of certain evidence or automatically requires the suppression of certain evidence. Neither of these suggestions represents what happened here. Both the District Court and the Circuit Court of Appeals painstakingly examined in meticulous detail the various factors involved. The search itself was by a uniform officer who had participated previously in the gambling investigation which related to the flower shop. He deliberately placed himself without consent in an area of the flower shop where he had no right to be. He deliberately seized and opened an envelope lying on the cash register which was in no way suspicious by reason of the fact that money appeared to be in the envelope or protruding therefrom since the cash register is not at all an unusual place for money. Having seized and searched the envelope without warrant, probable cause or consent, he then interrogated Lois Hennessey who was working in the store at that very moment. Thus, the illegal search was immediately exploited without the lapse of even a moment. Having gotten what he wanted from her, he replaced the envelope and its contents (apparently recognizing the contents as evidence of a crime for which he was duty bound to arrest but having no illusions at all about the propriety of his search). Within 24 hours he conveyed the information to detectives in his department; they conveyed it to FBI Agent Emory and Agent Emory to the prosecutor. The Government would have it that Emory was unaware of the illegality which tainted its origin. Purportedly he

did not even learn this when he went to talk to Miss Hennessey. She testified that she answered his questions *because* the FBI agent told her he had gotten her name from the North Tarrytown Police Department and she knew that he either already had the information or could get it from the North Tarrytown police (TR 126-27). There was thus a direct line from the illegal search and its accompanying interrogation to its exploitation. The Court of Appeals characterized this path as "both straight and uninterrupted." Judge Gagliardi specifically found that Lois Hennessey's knowledge first came to the attention of the Government as a result of the illegal search (Petitioner's Appendix 28A, 29A). The FBI agent testified that Hennessey came to his attention because of the illegal search (Petitioner's Appendix 30A). The court found that prior to the search the Government's attention had not focused on her. *Ibid.* No other employee of any of the businesses under investigation was even interviewed until after the defendant was indicted and then only because the indictment had exposed the existence of the ongoing investigation. FBI agent Emory testified that the entire history of the investigation had been to avoid employee contacts for fear of tipping off those being surveilled (TR 386). Moreover, at the time she was interviewed, Hennessey was no longer an employee of the store and therefore had no current information to provide. It is apparent that the finding of the District Court, affirmed on appeal, that the Government had failed to attenuate the taint of the illegal search was not clearly erroneous. Indeed, the Government conceded as much on oral argument in the Second Circuit. What the Government seeks to do here is to totally destroy the last vestige of the exclusionary rule by allowing illegally obtained evidence to come in as part of the prosecutor's direct case. Indeed, it comes in as the prosecution's entire case because without it the evidence against this defendant is concededly insufficient.

The Government's first argument is that the offense with which the defendant is charged occurred after the illegal search. Chalk that up to the ingenuity of the Federal Prosecutor. This defendant did not know of the illegal search. Certainly he had no intent to exploit its occurrence. He had no independent intent to commit any crime. He was the subject of a Federal subpoena from a prosecutor who knew of the search.* It was the prosecutor who exploited the illegal search not only in the secrecy of the grand jury but under the most egregious circumstances. See *U. S. v. Mandujano,* 425 U. S. 564 (1976), Brennan, J., and Stewart, J., concurring. The prosecutor did not tell Ceccolini of the illegal search and Ceccolini had no knowledge of it. Compare *U. S. v. Raftery,* 534 F. 2d 854, 857, n. 7 (9th Cir. 1976); *U. S. v. Turk,* 526 F. 2d 654 at 667, n. 39 (5th Cir. 1976). That distinction is alluded to also in *U. S. v. Paepke* set forth in the supplemental memorandum of the United States at page 14A. In addition, the Government's further conduct rose to a level of entrapment offensive to fundamental concepts of fair play embodied in the due process clause. The defendant appeared at the grand jury without counsel. He was given no warning of his right to counsel although that warning is normally given by United States attorneys in the Second Circuit. He was given no warning of his privilege against self-incrimination although that warning is usually given by United States attorneys in the Second Circuit. Still unaware of the illegal search, he was advised and, indeed, substantially disarmed by the prosecutor who told him (but not any other witness before this grand jury) that he was *not* a target of this investigation (grand jury minutes, p. 38; respondent's appendix, p. A1). This was the only advice he received from the prosecutor. By contrast, other

*And of its illegality if he spoke to his witnesses before issuing the subpoena.

witnesses appearing with counsel in this same investigation were warned specifically of their right to counsel, of their privilege against self-incrimination and were spared the advice they were not targets of this investigation, even where they were not such targets. This sequence of events, culminating in defendant's indictment, does not eliminate the suggestion of a sophisticated, calculated abuse of a grand jury.

It is particularly noteworthy that in the two cases cited by the prosecution for the proposition that such evidence should be admitted, the 5th and 9th Circuit Courts of Appeal took pains to point out that the situation might be very different if the defendant did not know prior to the grand jury of the illegal search. *U. S. v. Turk,* 526 F. 2d 667, 39; *U. S. v. Raftery,* 534 F. 2d 854, 857, n. 7 (9th Cir. 1976). As the 5th Circuit observes, there would be a deterrent value in prohibiting the surprise use of illegally seized evidence to obtain a perjury conviction.

It would seem that this is a classic entrapment situation. The defendant had no pre-disposition to go to the grand jury. He was there uncounseled, under compulsion of a Federal subpoena. He did not choose the subject matter of his interrogation or its time or place. He was clearly unaware that his constitutional rights under the 4th amendment had been violated. This was the basis upon which the prosecutor chose not to fairly apprise him of his situation but, rather, to steer him toward the shoals of a perjury indictment as he sat blindfolded, disarmed, uncounseled and unwarned in the grand jury.

This fact pattern is a far cry from those underlying the *Turk* and *Raftery* decisions in each of which the defendant sought to take advantage of his knowledge that the

search was illegal. A fair balance struck between the competing interests cannot allow the Government to play its cards as close to the vest as it did here and then allow it to turn around and request of this Court the right to violate the defendant's rights just one more time. Doubly so, where the evidence is introduced as part of the Government's *direct* case, and is the only evidence upon which a conviction may be based. In our view that procedure reeks of star chamber abuse. No case has gone so far as to sanction such a result and none should.

> "Courts which sit under our constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered Governmental use of the fruits of such invasions." *Terry v. Ohio,* 392 U. S. 1, 12-13 (1968).

In cases where official conduct is flagrantly abusive of 4th amendment rights, the deterrent value of the exclusionary rule is most likely to be effective. The corresponding mandate to preserve judicial integrity most clearly demands that the fruits of official misconduct be denied in this case. See, *Brown v. Illinois,* 422 U. S. 590 (1975).

It is perhaps apropos at this point to observe that Ptl. Biro had no reason to believe that his search was legal. His testimony excludes that possibility. Under the circumstances, to allow into the Government's direct case the results of so flagrant and deliberate an intrusion is to discard the 4th amendment. By reason of the fact that Biro returned the physical evidence to its original location after interrogating Miss Hennessey and its subsequent disappearance, there was no physical evidence to suppress. Unless the testimony of Biro and Hennessey is suppressed, the Government suffers naught for the flagrant violation and the defendant's rights are

totally unvindicated, The Government seeks to escape the logic which excludes Miss Hennessey's testimony by virtue of the fact that she is a "live witness." It does not, however, suggest that the testimony of Ptl. Biro should thereby be admissible although he is equally alive. This is true because such a suggestion would make a shambles of any pretense at deterrence by allowing the physical evidence to be suppressed but the illegal searcher to describe it with exactly the same force and effect. Why should the rule be different if a second police officer is present to allow him to testify because he is a live witness? Why should the rule be different as to Miss Hennessey who is a live witness to whom Biro revealed his ongoing illegal search, thereby exploiting it directly?

The history of the exclusionary rule has taught us to decide these matters on a case by case basis taking into account a myriad number of factors. This is precisely what the courts below did. Over a decade ago in *Wong Sun v. U. S.*, 371 U. S. 471 (1963), the court stated at 485,

> "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest • • • is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

At page 486, the Court added:

> "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U. S. 214, 76 S. Ct. 292, 100 L. Ed. 233, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U. S. 206,

> 80 S. Crt. 1437, 4 L. Ed. 2d 1669, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

Speaking of live testimony, the 5th Circuit stated in *U. S. v. Marder*, 474 F. 2d 1192 (1973), at 1196:

> "Any other conclusion would be totally inconsistent with the fundamental purpose of the exclusionary rule; to instill respect in government officers for a citizen's fourth amendment rights."

If the purpose of the exclusionary rule is to deter future unlawful police conduct and to effectuate the guarantee of the 4th amendment, it is clear that these purposes would be significantly, if not totally, destroyed by permitting the direct results of a deliberately illegal search to be used as the Government's direct case in a perjury prosecution based upon the concealment by the Government of the illegal search from the victim of the illegality. The decision in this case does not conflict at all with the decisions of the 5th and 9th Circuits in *Raftery* and *Turk*. As we have shown, they specifically excluded the situation where the defendant was unaware as here of the existence of the illegal search. The same is true in the *Paepke* case cited in the Government's supplemental memorandum. The *Scios* case cited by the Government (Appendix E to the petition, p. 39A *et seq.*) involved a different fact situation. Inadvertently, the Government has failed to inform the court in its supplemental memorandum that the District of Columbia Circuit Court of Appeals not only granted rehearing *en banc* in that case but in the same order vacated the panel opinion upon which the Government relied *sua sponte*.

The balance of the Government's brief is devoted to quarrelling with the Court of Appeals' findings. Both the District Court and the Court of Appeals did indeed

consider the lapse of time between the search and the witness' first response. There was no lapse of time. The witness was forced to respond immediately when confronted with the fruits of the search. That was her initial response not her response to agent Emory some time later when she already knew that he had or could get the information from the North Tarrytown police. The courts below considered and rejected the factual premise upon which the Government sought to argue that Miss Hennessey might have been discovered apart from the improper search and the Government has not sought review of that matter here (petition, p. 13). The Government attempts to argue that Lois Hennessey was not coerced. But the Court of Appeals observed that the District Judge made no specific findings regarding Lois Hennessey's state of mind (Petitioner's Appendix, 13A).* It is certainly arguable that she was coerced, finding herself confronted by a uniformed policeman holding incriminating evidence and asking incriminating questions of the only other person at the scene of the alleged crime. The courts below also considered the flagrant violation of defendant's rights, the lack of colorable excuse for the officer's conduct, his direct exploitation of the primary illegality and his actions in covering up the illegal search by replacing the physical evidence among other factors. To accept the Government's position in this case would be to clearly invite illegal searches, prosecutorial ingenuity in utilizing the fruits of such searches to create future crimes, as was done here, and the instant demise of the imperative of

*New findings would, of course, violate the double jeopardy clause.

judicial integrity which forbids the usage attempted to be made of illegal evidence by the Government in this case.*

Conclusion.

By reason of the double jeopardy clause, the Government has no right of appeal. In the alternative, the courts below properly excluded the illegally obtained evidence and, because their decision is consistent with the cases in other circuits, certiorari should be denied.

April 12, 1977.

Respectfully submitted,

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*While we have not directly commented upon the Government's version of the facts, we are compelled to note with regard to footnote 11 on pages 17 and 18 of the Government's petition that, (a) Miss Hennessey was questioned immediately at the scene by Biro, (b) When questioned later by an FBI agent, she testified that she was constrained to answer his question because she knew he had or could get the information from the local police (TR 126), (c) the initial search of the envelope was totally flagrant in that it was not lying on a counter but upon a cash register in an area of a store customarily reserved only for employees where the police officer was not entitled to be at the time of the search or any other time, (d) since Biro knew of the surveillance of the flower shop, the search must be considered purposeful and there can be no question but that it was exploited instantly and thereafter directly, (e) Finally, there is no exception in the constitution for the casual inspection by a police officer of one's private papers in one's place of business in one's absence.

APPENDIX.

RALPH CECCOLINI, called as a witness, having been duly sworn by the Forelady of the Grand Jury, testified as follows:

By Mr. Abzug:

Q. State and spell your name, please. A. C-e-c-c-o-l-i-n-i.

Q. First name? A. Ralph.

Q. And that's pronounced Ceccolini? A. Ceccolini, Ceccolini.

Q. Where do you live, Mr. Ceccolini? A. 95 Beekman Avenue, North Tarrytown.

Q. When were you born? A. May 19th, 1931.

Q. Are you married? A. Divorced.

Q. Any children? A. Two girls.

Q. Mr. Ceccolini, you have been subpoenaed before this Grand Jury to testify in connection with certain violations of Federal Law, particularly those laws concerning gambling.

I would like to advise you at this time that you are not a target of the investigation.

Mr. Ceccolini, how are you employed?